STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JADEN MAURICE MIARS,

Defendant-Appellant.

UNPUBLISHED
June 18, 2020

No. 347675
Allegan Circuit Court
LC No. 17-020962-FH

Before: MURRAY, C.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of false report or threat of terrorism, MCL 750.543m. Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to 20 to 40 years' in prison. Defendant now appeals his conviction and sentence as of right. We affirm the conviction but vacate the sentence and remand to the trial court for resentencing.

This case arises out of defendant's writing threatening messages on the walls of his jail cell about killing his ex-girlfriend, OH, and defendant acknowledged writing the messages in an interview with Allegan County Sheriff's Detective Mark Lytle.

Defendant first argues that the trial court erred when it allowed into evidence an excerpt from a transcript of defendant's probation violation hearing because it was hearsay. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217. An evidentiary error is not a ground for reversal unless, after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

At the outset, this Court notes that the trial court found that the transcript from the probation violation hearing was self-authenticating. In defendant's argument on appeal, defendant mentions that the transcripts were self-authenticating by stating that the court "might have been correct in ruling that the transcript fell under the hearsay exception in MRE 902(5)." Even though MRE

902(5) is not an exception to the hearsay rule, the transcript was not hearsay but rather an admission by a party opponent under MRE 801(d)(2)(B).

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay is inadmissible. MRE 802. However, under MRE 801(d)(2)(B), a statement is not hearsay but is rather an admission by a party opponent if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth. *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004). "An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the [p]art of a party which manifests circumstantially that party's assent in the truth of a statement made by another." *Shemman v American Steamship Co*, 89 Mich App 656, 673; 280 NW2d 852 (1979) (quotation marks and citation omitted).[1] "Adopted admissions are admissible when it clearly appears that the defendant understood and unambiguously assented to the statements made." *People v Lowe*, 71 Mich App 340, 346; 248 NW2d 263 (1976).

In this case, Detective Lytle testified at trial that he was aware that defendant made statements about this case during his probation violation hearing, and he testified about those statements in detail. The statement was made by defendant in response to a statement read by the trial court about what he had done. In concluding with its reading, the court asked defendant, "[s]o, do you agree that that's what happened that day[?]" to which defendant responded, "Yes." Defendant's response clearly indicated that he understood what was being asked and unambiguously assented to the statements made. See *id*. Therefore, the trial court did not err in admitting into evidence the excerpt from the transcript because defendant manifested an adoption or belief in its truth and, therefore, the excerpt was not hearsay. See MRE 801(d)(2)(B); see also *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998) (the trial court may be affirmed when it "reaches the right result, albeit for the wrong reason."), and *Solmonson*, 261 Mich App at 664.

Next, defendant argues that there was insufficient evidence to support his conviction of false report or threat of terrorism. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). In reviewing the sufficiency of the evidence, this Court must determine whether, evaluating the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). All conflicts in the evidence must be resolved in favor of the prosecution, and the court shall not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses. *Wolfe*, 440 Mich at 515.

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority[.]" *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

"Intent may be inferred from all the facts and circumstances." *People v Cameron*, 291 Mich App 599, 615; 806 NW2d 371 (2011).

Defendant was convicted of creating a false report or threat of terrorism under MCL 750.543m. MCL 750.543m states, in pertinent part, as follows:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
>
> (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

MCL 750.543b(a) defines act of terrorism as follows:

> (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
>
> (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
>
> (*ii*) An act that the person knows or has reason to know is dangerous to human life.
>
> (*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

In *People v Osantowski*, 274 Mich App 593, 595-598; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008),[2] the defendant was convicted of making a false report or threat of terrorism under MCL 750.543m after sending online messages to a female in the state of Washington indicating that he wanted to kill his family, bring weapons to school, kill the school police officer, and that he was in possession of guns and materials to make a bomb. The recipient informed her father, a law enforcement officer in Washington, who informed local authorities in Michigan. *Id*. at 599. The defendant argued on appeal that the evidence was insufficient to support his conviction, but we concluded that the defendant's statements about killing his family and the

[2] The decision of this Court was reversed by the Supreme Court only to the extent that it remanded the matter for resentencing. *People v Osantowski*, 481 Mich 103, 105; 748 NW2d 799 (2008). The Supreme Court determined that a score of 100 points for offense variable (OV) 20 was inappropriate, and reinstated the trial court's judgment of sentence. *Id.*

school police officer, as well as bringing weapons to school, were unambiguous threats. *Id*. at 613. "It is also reasonable to conclude that threatened acts of school violence, including defendant's statements that he would peek under tables and question cowering individuals why he should spare their lives, were intended to intimidate the student population[.]" *Id*. Thus, the defendant's online messages "provided ample evidence to support" his conviction. *Id*.

Here, defendant wrote statements on the walls of two different jail cells, A8 and A10, while he was an inmate at the Allegan County Jail. The writings in Cell A8 read, "I am going to walk into Three Rivers high school this fall and shoot [OH] in her classroom. If I already haven't shot her up by—shot up her house by school starts," and "I am going to walk in Three Rivers high school this fall and shoot [OH] in the classroom if I already haven't shot her house by school starts." Additionally, Detective Lytle stated that another writing read, "I am going to walk into T.R.H.S. and kill [OH] with a Glock model 43 9 millimeter."

In Cell A10, Detective Lytle stated that the messages read, "You guys are going to be murdered," and

> I'm going to shoot [OH], [address], in the head with a Glock 43, 9 millimeter as soon as I get out of jail, this year, 2017. She told me last—she told on me last year, 2016, and I almost was sent to prison. I am going to make her regret that decision with your life, bitch. I am going to kill you and your whole family. Put that on everything I love.

Detective Lytle stated that there were also writings on a piece of paper on the table in A10 that listed out OH's family members and stated, "Where I am going to kick in your door and shoot everybody as fast as I can. Signed by Jaden Miars." This writing also said "T.R.H.S., Three Rivers 6" and listed several names.

Additionally, while being interviewed about the writings, the following exchange occurred between defendant and Detective Lytle:

> *Detective Lytle*: I am going to talk to you about your cells, number 8 and number 10, right? Okay. And I have talked to you about this before, with [OH]—is it [OH]?
>
> [*Defendant*]: Yeah.
>
> *Detective Lytle*: Okay. And the jail Sergeant Tavern brought me back there to look at what you wrote on the wall and what you wrote on the pad and stuff like that. Are you still having homicidal thoughts?
>
> [*Defendant*]: (Inaudible).
>
> *Detective Lytle*: Okay. Do you know that she is in Three Rivers school? I mean, what grade would she be in by now?
>
> [*Defendant*]: She would be senior year.

Detective Lytle: She would be a senior this year?

[*Defendant*]: Fall.

Detective Lytle: This fall. Okay. And you still thinking when you get out of here, you want to kill her.

[*Defendant*]: Mmmmhmm.

Detective Lytle: Okay. That's why you wrote that you are going to go to Three Rivers high school because you know she will be there.

[*Defendant*]: Mmmhmm.

Detective Lytle: Okay. Are you intending to hurt anybody else when you are there at the school?

[*Defendant*]: No.

Detective Lytle: Just her? Okay. What about her—what about that other kid, does he still go to school there?

[*Defendant*]: No, he don't go to school there.

Detective Lytle: No. Okay. And then where, on the one wall, I forget if it was in cell 8 or cell 10. I think it's 10, the one that you are currently in, you have like a whole list of people.

[*Defendant*]: Oh, yeah. That's her family.

Detective Lytle: That's her family.

[*Defendant*]: Yeah.

Detective Lytle: So you want to kill her and her entire family?

[*Defendant*]: Yeah.

Detective Lytle: Why do you want to do that?

[*Defendant*]: Because of—

Detective Lytle: I just want you to be honest with me. I mean—

[*Defendant*]: Like, to be honest, I am just like, make her mad.

Detective Lytle: So if you kill her, what's that going to do?

[*Defendant*]: Nothing really. But if I kill her family, then she (inaudible). (Inaudible) and shit.

Detective Lytle: Okay. Anybody else, who all is in that out of the list that you wrote down, that's all her family, correct?

[*Defendant*]: That I know of.

* * *

Detective Lytle: When do you get out or when do you think you are getting out of here . . .

[*Defendant*]: Court date on the 18th of July and I'm going to plead guilty. Then I should get sentenced six weeks after that. And go back to KPEP, because KPEP will help me (inaudible) and get a job. I can get a job no problem, it's just that at KPEP I can get a job quicker.

* * *

Detective Lytle: Do you have any plans to go and hurt her [OH].

[*Defendant*]: (Inaudible) I've got a lot of plans. I've thought about driving to her house, shooting it up and leaving. Driving to her house, kicking her door in. I've thought about somehow finding out what her—her first and last hours are in school and walking there and (inaudible)

Detective Lytle: So you would walk into the school and shoot her when she is there?

[*Defendant*]: (Inaudible).

Detective Lytle: But what are you going to do with all of those kids that are there?

[*Defendant*]: I don't think about that.

Detective Lytle: You know what I mean?

[*Defendant*]: Yeah.

Detective Lytle: Well, do you think it would terrorize the school if you walked in there and (inaudible)?

[*Defendant*]: (Inaudible).

Detective Lytle: You know? I mean in todays' day and age we don't need any of that.

[*Defendant*]: Right.

Detective Lytle: So you thought about going into the school, even though you know that it would terrorize all of the other kids that are in there?

[*Defendant*]: I think (inaudible) in my head. Some (inaudible) not good. (Inaudible).

Detective Lytle: Did you see (inaudible)?

[*Defendant*]: (Inaudible).

* * *

Detective Lytle: Okay. How do you plan on getting a gun?

[*Defendant*]: I can get it easily, I can talk to one of my friends.

Detective Lytle: You are pretty specific about a Glock 43.

[*Defendant*]: Mmmhmm. It's my favorite one.

* * *

Detective Lytle: Why did you write on the walls in two different cells? you've got paper.

[*Defendant*]: I've got paper and (inaudible). But I—I don't know why I write bro. (Inaudible) I know I am not going to forget.

The first element of a false threat or threat of terrorism is "[a]n act that would be a violent felony under the laws of this state, whether or not committed in this state." MCL 750.543b(a)(*i*). MCL 750.543b(h) defines a violent felony as

> a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

The evidence was sufficient to establish this element, as defendant threatened to "walk into Three Rivers high school this fall and shoot [OH] in her classroom. If I already haven't shot her up by—shot up her house by school starts," and "to walk in Three Rivers high school this fall and shoot [OH] in the classroom if I already haven't shot her house by school starts." He also said, "I am going to walk into T.R.H.S. and kill [OH] with a Glock model 43 9 millimeter." Defendant threatened to kill OH by gunshot. Shooting someone with a gun with the intent to kill constitutes the use of physical force against an individual. Therefore, the record supports the jury finding that the first element was met. See MCL 750.543b(a)(*i*).

The second element of a false threat or threat of terrorism is to threaten "[a]n act that the person knows or has reason to know is dangerous to human life." MCL 750.543b(a)(*ii*). MCL 750.543b(b) states that "[d]angerous to human life" means that which causes a substantial likelihood of death or serious injury or is a violation of MCL 750.349 or MCL 750.350.[3] Defendant's threats did not relate to kidnapping, so MCL 750.349 or MCL 750.350, have no relevant application. However, the evidence supports a finding that defendant knew or had reason to know that he was threatening acts that would create a substantial likelihood of serious injury. Defendant threatened to kill OH by gunshot. Shooting someone with a gun with the intent to kill them creates a substantial likelihood of death or serious injury. Therefore, the record supports that the second element of MCL 750.543b(a)(*ii*) was met.

The third and final element requires a showing that defendant intended to intimidate or coerce a civilian population. See MCL 750.543b(a)(*iii*). The record reflects that defendant stated to Detective Lytle that he knew his actions would cause the school "to go into lockdown." Detective Lytle stated that defendant "knew that people would be upset and that it would cause problems within the school." Additionally, when defendant was asked what he thought this would do to all the kids in the school, defendant responded that everyone would be upset, the school would go into lockdown, and it would affect several people at the school. Defendant also stated that he wanted to kill OH's entire family. Given defendant's statements, the record supports that his threats were made to intimidate or coerce a civilian population—OH and her family—fulfilling the third element of MCL 750.543b(a)(*iii*). See MCL 750.543b(a)(*iii*); *Osantowski*, 274 Mich App at 613 (the defendant's threatened acts of school violence were intended to intimidate the student population).

Accordingly, in evaluating the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that there was sufficient evidence to convict defendant of a threat of terrorism beyond a reasonable doubt. See *Wolfe*, 440 Mich 513-514; see also *Cameron*, 291 Mich App at 615.

Defendant's final argument is that he did not commit an act of terrorism or take any action in doing so, and therefore, offense variable (OV) 20 should be assessed at zero points rather than 50 points.

"The interpretation and application of the sentencing guidelines present questions of law that [this Court] review[s] de novo." *People v Laidler*, 491 Mich 339, 342; 817 NW2d 517 (2012). Factual determinations relating to scoring variables used for sentencing are reviewed for clear error, and must be supported by a preponderance of the evidence. *People v Dickinson*, 321 Mich App 1, 20-21; 909 NW2d 24 (2017).

OV 20, MCL 777.49a, provides, in pertinent part:

[3] MCL 750.349 describes felony kidnapping and its penalties. MCL 750.350 describes felony kidnapping-child enticement and its penalties.

(1) Offense variable 20 is terrorism. Score offense variable 20 by determining which of the following applies and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device .....50 points

(c) The offender supported an act of terrorism, a terrorist, or a terrorist organization .....25 points

(d) The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization .....0 points

OV 20 specifically incorporates the definition of "act of terrorism" from MCL 750.543b as provided above. The term "violent felony" includes "a felony in which an element is the . . . threatened use of physical force against an individual." MCL 750.543b(h).

In *People v Osantowski*, 481 Mich 103, 105; 748 NW2d 799 (2008), the issue before the Court was "whether a score of 100 points is appropriate for [OV] 20, which addresses terrorism, when a defendant threatens to cause harm using certain substances or devices but his threats, themselves, do not constitute *acts* of terrorism as defined by MCL 750.543b(a)." The Court determined that the plain language of MCL 777.49a established that for 100 or 50 points to be assessed, the defendant must have " '*committed an act of terrorism by* using or threatening to use' one of the enumerated substances or devices." *Id*. at 108-109. "[T]he use or threatened use must constitute the *means* by which the offender committed an *act* of terrorism." *Id*. at 109. Thus, a score of 100 or 50 points for OV 20 "is justified only when a defendant's threats also constitute acts of terrorism." *Id*. at 110. The Court explained that 100 or 50 points could still be assessed when a defendant is convicted of making a terrorist threat or false report of terrorism under MCL 750.543m:

> OV 20 meaningfully applies to convictions for threats and false reports under MCL 750.543m in at least two ways. First, the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense. A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence. A defendant may plead guilty—perhaps pursuant to a plea deal resulting from an original charge of terrorism—merely to making a terrorist threat, MCL 750.543m, or a jury may find him guilty beyond a reasonable doubt of such a threat. But, if a preponderance of the evidence supports a finding that the defendant's threat *also* constituted an *act* of terrorism, in the sentencing phase the court may impose a score of 50 or 100 points for OV 20. Second, OV 20 does not address only acts of terrorism. Rather, a defendant may receive 25 points if he "supported an act of

> terrorism, a terrorist, or a terrorist organization." MCL 777.49a(1)(c). Accordingly, a defendant convicted under MCL 750.543m merely of making a terrorist threat may receive points under OV 20 even if the record does not support a conclusion that he committed an act of terrorism; his threat may qualify as an act of support, justifying a score of 25 points. [*Id*. at 111 (citation omitted).]

The *Osantowski* Court determined that the defendant's online messages did not constitute an act of terrorism, in part, because defendant did not "actually intend his e-mailed threats to another teenager 'to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.' " *Id*. at 112, quoting MCL 750.543b(a)(*iii*). Therefore, the trial court's decision to assess the defendant zero points for OV 20 was not clearly erroneous, and the Supreme Court reinstated the judgment of sentence entered by the trial court. *Id*. at 112.

Similarly, here, it cannot be said that defendant's acts constituted an *act* of terrorism. Nothing in the evidence suggests that defendant actually intended for the messages that he wrote on his cell walls to intimidate or coerce a civilian population. See *id*. Therefore, the trial court clearly erred in scoring OV 20 at 50 points.

Accordingly, defendant's conviction is affirmed; the judgment of sentence is vacated, and this matter is remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Jane E. Markey